

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWARD R. KEENEY and U.S. POSTAL SERVICE,
POST OFFICE, Brooklyn, NY

*Docket No. 99-216; Submitted on the Record;
Issued November 6, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs abused its discretion by refusing to reopen appellant's case for a merit review under 20 C.F.R. § 10.138.

On January 26, 1975 appellant, then a 21-year-old special delivery messenger, sustained injuries to his right hand and back while in the performance of duty. The Office accepted appellant's claim for severe contusion and soft tissue injury of the right hand and contusion of the lumbosacral spine. Appellant ceased working on the date of his injury and never returned to work. He received wage-loss compensation for approximately 21 years following his 1975 employment injury.

In a decision dated December 20, 1996, the Office terminated compensation benefits on the basis that the weight of the medical evidence, as represented by the October 2, 1996 opinion of Dr. Irvin J. Nelson, a Board-certified orthopedic surgeon and impartial medical examiner, established that appellant no longer suffered any continuing disability causally related to his employment injury of January 26, 1975. This decision was subsequently affirmed by an Office hearing representative on May 8, 1997.

On May 4, 1998 appellant requested reconsideration. By decision dated June 18, 1998, the Office denied appellant's request for reconsideration. Appellant subsequently filed an appeal with the Board on September 18, 1998.¹

¹ Appellant submitted additional medical evidence on appeal. Inasmuch as the Board's review is limited to the evidence of record that was before the Office at the time of its final decision, the Board cannot consider appellant's newly submitted evidence. 20 C.F.R. § 501.2(c).

The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal.² As appellant filed his appeal with the Board on September 18, 1998, the Board lacks jurisdiction to review the Office's most recent merit decision dated May 8, 1997. Consequently, the only decision properly before the Board is the Office's June 18, 1998 decision denying appellant's request for reconsideration.

The Board has duly reviewed the case on appeal and finds that the Office abused its discretion in not reviewing medical reports received prior to rendering its decision.

Section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.³ Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.138(b)(1), the Office will deny the application for review without reaching the merits of the claim.⁴

Appellant's May 4, 1998 request for reconsideration was accompanied by two recent reports, dated April 20 and April 30, 1998, from his neurologist and orthopedist, Drs. Eva Hirschenstein and Stanley Soren. Both physicians concluded that appellant remained totally disabled due to his back condition. In its June 18, 1998 decision, the Office incorrectly stated "[appellant] submitted no medical evidence in support of the request." Inasmuch as the Office failed to consider the newly submitted reports from Drs. Hirschenstein and Soren, the Office's June 18, 1998 decision is set aside.⁵ Accordingly, the case is remanded to the Office to fully consider the evidence that was properly submitted prior to the issuance of the Office's June 18, 1998 decision.

² *Oel Noel Lovell*, 42 ECAB 537 (1991); 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

³ 20 C.F.R. § 10.138(b)(1).

⁴ 20 C.F.R. § 10.138(b)(2).

⁵ As previously noted, the Board's jurisdiction over a case is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). Inasmuch as the Board's decisions are final as to the subject matter appealed, it is crucial that all relevant evidence that was properly submitted to the Office prior to the time of issuance of its final decision be addressed by the Office. 20 C.F.R. § 501.6(c); *see William A. Couch*, 41 ECAB 548, 553 (1990).

The decision of the Office of Workers' Compensation Programs dated June 18, 1998 is hereby set aside, and the case is remanded for further consideration consistent with this opinion.

Dated, Washington, DC
November 6, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member